Rosazanam bin Khalid v Tri-Prestige Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-02–2224 OF 2011, J-02–2225 OF 2011 AND J-02–2226 OF 2011
CLEMENT SKINNER, LIM YEE LAN AND ROHANA YUSUF JJCA
3 MAY 2013

Contract — Sale and purchase of shares — Agreement — First appellant given call option to subscribe to shares at par value — Whether shares were restricted bumiputra shares or unrestricted shares — Misrepresentation — Whether first appellant represented that he could freely transfer restricted shares — Whether second appellant misrepresented status of call option shares to respondent company — Breach — Whether first appellant acted in breach of share sale agreement — Whether first appellant in breach of terms of consultancy agreement — Liability — Whether first appellant jointly or severally liable to respondent — Whether liability had been established against second appellant

Evidence — Standard of proof — Beyond reasonable doubt basis or on balance of probabilities — Misrepresentation — Whether trial judge had wrongly applied standard based on 'balance of probabilities' in respect of fraudulent misrepresentation — Whether respondent had pleaded fraudulent misrepresentation or misrepresentation simpliciter — Conspiracy to defraud — Whether trial judge erred in finding that conspiracy to defraud had been proved by applying standard of balance of probabilities — Whether misdirection should result in conspiracy claim being set aside

Tort — Duty of care — Breach — Whether third appellant failed to properly advise respondent client — Liability — Whether third appellant was jointly or severally liable to respondent

Matang Holding Bhd ('Matang') intended to convert and develop 44 pieces of agriculture land it owned into a mixed housing/commercial development ('the project'). In order to procure and obtain the development approvals it required for this project, Matang decided to enhance its bumiputra equity participation in its subsidiary company called Matang Realty Sdn Bhd (MRSB), which would undertake the project. With this in mind, Matang and MRSB entered into a consultancy agreement with Rosazanam bin Khalid ('the first appellant'). In consideration for his services in procuring the development approvals, the first appellant was given a call option to subscribe to 30% of the shares in MRSB at par value ('the call option shares'). In effect these call option shares

were created to satisfy the requirement of 30% Bumiputra equity participation in MRSB to enable MRSB to obtain the development approvals it required for the project. The first appellant instructed Liew Soon Seng ('the second appellant'), a broker, to find a buyer for the call option shares. The second appellant approached one Choi Keok Beng and his son ('the buyers') to purchase the call option shares, by informing them that the call option shares would be worth more than their par value when the development approvals were secured. The buyers decided to use Tri Prestige Sdn Bhd ('the respondent') as their corporate vehicle for the purchase of the call option shares in MRSB. However, the buyers learned that as Matang had identified the call option shares as representing the 30% Bumiputra equity participation shares in MRSB, the respondent a non-bumiputra company, could not subscribe for the call option shares in its own name. The second appellant had then advised the buyers to use a bumiputra nominee company to buy the call option shares. Although the buyers had initially agreed to this arrangement, they later became uncomfortable and wanted direct ownership of the call option shares through the respondent. At this point the buyers and the respondent claim that the second appellant had allegedly assured the respondent that it could directly purchase the shares from the first appellant after the first appellant had first exercised the call option. The third appellant, a lawyer whom the respondent consulted, advised the respondent that the bumiputra restriction placed on the call option shares would not apply after the call option had been exercised by a bumiputra, ie the first appellant. Based on the representations and advice of the appellants the respondent had entered into an agreement for the sale and purchase of the call option shares from the first appellant for a consideration of RM40m. After executing the share sales agreement and paying the first appellant a deposit of RM5m, the respondent discovered that the call option shares were restricted shares meant for bumiputras only. The respondent then terminated the share sales agreement and commenced the present action against the appellants for fraud and deceit and alternatively conspiracy to defraud. The respondent's cause of action against the first and second appellants was also founded on misrepresentation and as against the third appellant negligence and breach of duty of care. The trial judge found that the call option shares were intended to be restricted bumiputra shares, and that the first and second appellants were in breach for representing otherwise. The trial judge also found the third appellant negligent in the performance of his duties to the respondent as its lawyer at the material time. Consequently, the High Court granted judgment in favour of the respondent against each of the first, second and third appellants on a joint and several basis. These were the three appeals against that decision, which for convenience were heard together. The appellants submitted, inter alia, that although the respondent's allegations of fraud and deceit and alternatively conspiracy to defraud needed to be proved against them on a 'beyond reasonable doubt' standard, the trial judge had wrongly applied a standard based on a 'balance of probabilities'.

Held, allowing the second appellant's appeal with costs and dismissing the appeals of the first and third appellants with costs:

(1) A perusal of the pleadings showed that the respondent had pleaded misrepresentation simpliciter against the appellants and not fraudulent misrepresentation. As such, the fact that the trial judge had used the word 'fraudulent' did not change the fact that what was pleaded was misrepresentation only. Accordingly the allegation of misrepresentation made against the first and second appellants needed to be proved on a balance of probabilities only, which standard the trial judge correctly applied (see para 28).

(2) With regard to the allegation of conspiracy to defraud, the trial judge had come to finding that this allegation had been proved by applying the standard of a balance of probabilities. The trial judge had erred in doing so because case law shows that where an allegation of fraud is made in civil proceedings, the standard of proof required must be on a beyond reasonable doubt basis and not on a balance of probabilities. Thus, the conspiracy claim made against all the appellants was set aside. However, the misdirection by the trial judge did not affect the outcome of this case because the respondent also pleaded other separate causes of action against each of the appellants (see paras 30–31 & 51).

(3) The words in Recital D of the share sales agreement should be read as a whole. When so done it was clear that the first appellant had made a representation that the call option shares could be transferred 'freely and without restriction', which was not the case. Further, the call option shares were offered to the first appellant to be accepted on the terms of the consultancy agreement ('the CA'). The CA that the first appellant had entered into with Matang and MRSB expressly required the first appellant to obtain the consent of Matang or MRSB to assign the benefit of the call option to others and restricted such assignment to bumiputras only. As such, the trial judge was correct to find that the first appellant had made a misrepresentation and was in breach of the contract (see paras 35–37).

(4) The fact that the second appellant knew that the call option shares were bumiputra shares did not show that the second appellant had misrepresented the status of the call option shares to the buyers and the respondent company. The evidence also showed that the second appellant had already disclosed to the buyers and the respondent company that the shares were bumiputra shares and had also advised the buyers and the respondent to seek legal advice on this matter. Neither was the second appellant aware of the restrictions placed on the first appellant in the Consultancy Agreement. As such, there was no evidential basis for the trial judge to find that the second appellant had misrepresented to the

respondent the status of the call option shares and no liability had been established against the second appellant on the causes of action pleaded against him (see paras 40–44).

(5) The trial judge had correctly held that the third appellant as a lawyer was in breach of the duty of care, which he owed to the respondent as his client, when he failed to properly advise it before the signing of the share sale agreement that the call option shares were bumiputra shares (see paras 47 & 48).

(6) The judgment of the High Court that found the appellants liable jointly was varied to reflect the liability of the first and third appellants on a several basis. Consequently, the first and third appellants were severally liable to pay the respondent the sum of RM5,000,000 with interest (see paras 51–52).

[Bahasa Malaysia summary

Matang Holding Bhd ('Matang') berhasrat untuk menukar dan memajukan 44 bidang tanah pertanian yang dimilikinya kepada pembangunan komersial/rumah campuran ('projek ini'). Bagi tujuan memperoleh dan mendapatkan kelulusan pembangunan yang diperlukan untuk projek ini, Matang membuat keputusan untuk meningkatkan penyertaan ekuiti bumiputera dalam syarikat yang dipanggil Matang Realty Sdn Bhd (MRSB), yang akan melaksanakan projek ini., Berdasarkan ini, Matang dan MRSB telah memasuki satu perjanjian perundingan dengan Rosazanam bin Khalid ('perayu pertama;). Sebagai balasan untuk perkhidmatannya dalam memperoleh kelulusan pembangunan tersebut, perayu pertama telah diberikan pilihan panggilan untuk membeli 30% daripada saham dalam MRSB pada nilai tara ('saham pilihan panggilan'). Pilihan panggilan saham ini dibuat untuk memenuhi keperluan 30% penyertaan ekuiti bumiputra dalam MRSB untuk mendapat kelulusan pembangunan yang diperlukan untuk projek tersebut. Perayu pertama mengarah Liew Soon Seng ('perayu kedua'), seorang broker, untuk mencari pembeli untuk saham pilihan panggilan itu. Perayu kedua telah berjumpa Chi Keok Ben dan anak lelakinya ('pembeli') untuk membeli saham pilihan panggilan itu, dengan memberitahu mereka bahawa saham pilihan panggilan ini akan bernilai lebih daripada nilai taranya apabila kelulusan pembangunan diperoleh. Pembeli tersebut memutuskan untuk menggunakan Tri Prestige Sdn Bhd ('responden') sebagai jentera korporat mereka untuk membeli saham pilihan panggilan dalam MSB. Walau bagaimanapun, pembeli tersebut mendapati bahawa oleh kerana Matang telah mengenalpasti saham pilihan panggilan sebagai mewakili 30% daripada saham penyertaan ekuiti bumiputera dalam MRSB, responden yang merupakan sebuah syarikat bukan bumiputera, tidak boleh membeli saham pilihan panggilan ini atas nama sendiri. Perayu kedua kemudian telah menasihatkan pembeli tersebut untuk menggunakan syarikat penama bumiputera untuk membeli saham pilihan panggilan. Walaupun pembeli tersebut pada mulanya

bersetuju dengan aturan ini, mereka kemudian tidak selesa dan ingin milikan terus ke atas saham pilihan panggilan ini melalui responden. Pada masa ini pembeli tersebut dan responden mendakwa bahawa perayu kedua dikatakan telah meyakinkan responden bahawa ia boleh membeli terus saham daripada perayu pertama selepas perayu pertama telah terlebih dahulu menggunakan pilihan panggilan. Perayu ketiga, peguam yang mana responden mendapat nasihat, telah menasihatkan responden bahawa sekatan bumiputera yang terletak atas saham pilihan panggilan tidak terpakai selepas pilihan panggilan dilakukan oleh seorang bumiputera, iaitu perayu pertama. Berdasarkan representasi dan nasihat perayu-perayu, responden telah memasuki perjanjian untuk jual beli saham pilihan panggilan daripada perayu pertama dengan balasan RM40 juta. Selepas menyempurnakan perjanjian jualan saham itu dan membayar perayu pertama deposit berjumlah RM5 juta, responden mendapati bahawa saham pilihan panggilan ini adalah saham terhad yang bermaksud hanya untuk bumiputera sahaja. Responden kemudian telah menamatkan perjanjian jualan saham itu dan memulakan tindakan ini terhadap perayu-perayu kerana fraud dan penipuan dan secara alternatif konspirasi untuk menipu. Kausa tindakan responden terhadap perayu-perayu pertama dan kedua juga berasaskan salah nyata dan terhadap perayu ketiga untuk kecuaian dan pelanggaran kewajipan berjaga-jaga. Hakim perbicaraan mendapati bahawa saham pilihan panggilan adalah bermaksud untuk saham bumiputera terhad, dan perayu-perayu pertama dan kedua telah melakukan pelanggaran dengan menggambarkan sebaliknya. Hakim perbicaraan juga mendapati perayu ketiga cuai dalam melaksanakan kewajipannya kepada responden sebagai peguamnya pada masa matan. Berikutan itu, Mahkamah Tinggi telah memberikan penghakiman menyebelahi responden terhadap setiap perayu-perayu pertama, kedua dan ketiga atas dasar bersesama dan berasingan. Berikut adalah tiga rayuan terhadap keputusan terebut, yang mana untuk memudahkan telah didengar bersama. Perayu-perayu berhujah, antara lain, bahawa meskipun dakwaan responden berhubung fraud dan penipuan dan secara alternatif konspirasi kepada penipuan perlu dibuktikan terhadap mereka atas piawai 'melampaui keraguan munasabah', hakim perbicaraan telah terkhilaf kerana menggunakan piawai yang berdasarkan 'imbangan kebarangkalian'.

Diputuskan, membenrkan rayuan perayu kedua dengan kos dan menolak rayuan-rayuan perayu pertama dan ketiga dengan kos:

(1) Penelitian pliding menunjukkan bahawa responden telah mempli simpliciter salah nyata terhadap perayu-perayu dan bukan salah nyata berunsur fraud. Oleh itu, fakta bahawa hakim perbicaraan telah menggunakan perkataan 'fraudulent' tidak mengubah fakta bahawa apa yang dipli hanya salah nyata. Sewajarnya dakwaan salah nyata yang dibuat terhadap perayu-perayu pertama dan kedua perlu dibuktikan atas

imbangan kebarangkalian sahaja, yang mana piawai itu telah digunakan dengan betul oleh hakim perbicaraan (lihat perenggan 28).

(2) Berhubung dakwaan konspirasi untuk menipu, hakim perbicaraan telah membuat penemuan bahawa dakwaan ini telah dibuktikan dengan menggunakan piawai imbangan kebarangkalian. Hakim perbicaraan telah terkhilaf dengan berbuat demikian kerana undang-undang kes menunjukkan bahawa di mana dakwaan fraud dibuat dalam prosiding sivil, piawai pembuktian yang perlu adalah berasaskan melampaui keraguan munasabah dan bukan atas imbangan kebarangkalian. Oleh itu, tuntutan konspirasi yang dibuat terhadap semua perayu-perayu telah diketepikan. Walau bagaimanapun, salah arah oleh hakim perbicaraan tidak menjejaskan keputusan kes ini kerana responden juga telah membuat pli kausa tindakan lain yang berasingan terhadap setiap perayu (lihat perenggan 30–31 & 51).

(3) Perkataan-perkataan dalam Resital D kepada perjanjian jualan saham patut dibaca secara menyeluruh. Jika berbuat demikian adalah jelas bahawa perayu pertama telah membuat representasi bahawa saham plilihan panggilan boleh dipindah secara 'freely and without restriction', yang mana bukan begitu. Bahkan, saham pilihan panggilan telah ditawarkan kepada perayu pertama untuk diterima atas terma perjanjian konsultasi ('PK'). PK yang dimasuki oleh perayu pertama dengan Matang dan MRSB jelas menghendaki perayu pertama mendapatkan persetujuan Matang dan MRSB untuk mengagihkan faedah pilihan panggilan kepada yang lain dan membataskan agihan itu kepada bumiputera sahaja. Oleh itu, hakim perbicaraan adalah betul untuk memutuskan bahawa perayu pertama telah membuat salah nyata dan telah melanggar kontrak itu (lihat perenggan 35–37).

(4) Fakta bahawa perayu kedua mengetahui bahawa saham pilihan panggilan adalah saham bumiputera tidak menunjukkan bahawa perayu kedua telah memberi kenyataan salah tentang status saham pilihan panggilan kepada pembeli tersebut dan responden syarikat. Keterangan juga menunjukkan bahawa perayu kedua telahpun mendedahkan kepada pembeli tersebut dan responden syarikat bahawa saham tersebut adalah saham bumiputera dan juga telah menasihatkan pembeli tersebut dan responden untuk mendapat nasihat guaman berhubung perkara ini. Perayu kedua juga tidak menyedari tentang sekatan yang diletakkan ke atas perayu pertama dalam Perjanjian Konsultasi itu. Oleh itu, tiada asas keterangan untuk hakim perbicaraan mendapati bahawa perayu kedua telah memberi kenyataan salah kepada responden tentang status saham pilihan panggilan dan tiada liabiliti telah dibuktikan terhadap perayu kedua berhubung kausa tindakan yang dipli terhadapnya (lihat perenggan 40–44).

(5) Hakim perbicaraan telah membuat keputusan betul bahawa perayu

ketiga sebagai peguam telah melanggar kewajipan berjaga-jaga terhadap responden sebagai anakguamnya, apabila dia gagal memberi nasihat sewajarnya sebelum ia menandatangani perjanjian jualan saham bahawa saham pilihan panggilan itu adalah saham bumiputera (lihat perenggan 47–48).

(6) Penghakiman Mahkamah Tinggi yang mendapati perayu-perayu bertanggungjawab secara bersesama telah diubah untuk menggambarkan liabiliti perayu-perayu pertama dan ketiga atas beberapa dasar. Berikutan itu, perayu-perayu pertama dan ketiga adalah bertanggungjawab secara berasingan untuk membayar responden sejumlah RM5,000,000 dengan faedah (lihat perenggan 51–52).]

Notes

For a case on agreement, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 6307.

Cases referred to

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 CLJ 1, FC (refd)

Appeal from: Civil Suit No: MT2–22–492 of 2004 (High Court, Johor Bahru)

Yapp Hock Swee (Yapp Phua & Co) for the first appellant.
Liow Si Khoon (Hiew Ka Ying with him) (Liow & Co) for the second appellant.
Wu Tern Yue (Wu & Co) for the third appellant.
Yeo Yang Poh (Yeo, Tan, Hoon & Tee) for the respondent.

Clement Skinner JCA:

[1] There are three appeals before us. They all arise from the decision of the High Court, Johore Bahru dated 22 July 2011. The plaintiff in the High Court was Tri-Prestige Sdn Bhd, ('the respondent'). There were three defendants in the court below. The High Court granted judgment in favour of the plaintiff against each of them jointly and severally. Being unhappy with that decision each of the defendants have filed separate appeals. Hence, these three appeals. For convenience their appeals are being heard together. The appellant in J-02–2224 of 2011 ie Rosazanam bin Khalid will be referred to as the first appellant. The appellant in J-02–2225 of 2011 ie Liew Soon Seng is referred to as the second appellant, while the appellant in J-02–2226 of 2011 ie Hua Kai Fook is referred to as the third appellant.

BACKGROUND FACTS

[2] The respondent claims it suffered a loss of RM5m when it was misled

into buying certain shares though the wrongful acts of the appellants. Very briefly the facts leading to this suit were these.

[3] Matang Holding Bhd owned 44 pieces of agriculture land, which it wanted to turn into a mixed housing/commercial development. Matang Holding Bhd ('Matang') decided to use a subsidiary company called Matang Realty Sdn Bhd ('MRSB') as the development company. Matang knew that it would require 30% *bumiputera* equity participation in MRSB to enable the latter to obtain the development approvals it required for its project as MRSB would be developing more than ten acres of land. The approval for the proposed development would involve a process of surrender and re-alienation of the lands which involved two stages ie 'SBKS1' which involved procurement of the 'principal approval' and 'SBKS2' which involved the procurement of the 'Final Approval'.

[4] With a view to obtaining the above mentioned approvals, Matang and MRSB entered into a consultancy agreement with Rosazanam bin Khalid the first appellant to procure the 'SBKS' approvals. In return for his services Matang created and gave the first appellant a call option to subscribe at par value for 30% of the shares in MRSB ('the call option shares'). These call option shares were created to satisfy the requirement of 30% *bumiputera* equity participation in MRSB as the company undertaking the proposed development. It is not in dispute that upon the approval of the proposed development, the call option shares would be worth much more than their par value.

[5] The first appellant did not intend to take up the call option shares himself but was interested to sell them to any interested party and approached the second appellant Mr Liew Soon Seng a broker, to find a buyer for those shares.

[6] The second appellant approached Mr Choi Keok Bang and his son Rick Choi, to purchase the call option shares, informing them that with the conversion and approval of the said 44 pieces of land for development the call option shares would be worth much more than their par value.

[7] The second appellant also informed the Choi's that the first appellant was interested to sell the call option shares at RM40m.

[8] The Choi's expressed interest and so the second appellant introduced the third appellant who was a lawyer to act for the Choi's and later for the respondent which was the company used by the Choi's as their corporate vehicle for this transaction. The respondent was not a *bumiputera* company. This fact was known to all parties at all material times. The significance of the respondent not being a *bumiputera* company was this: Matang had identified

the call option shares as representing the 30% *bumiputera* equity participation shares in MRSB. This in turn meant that the respondent could not subscribe for the call option shares in its own name.

[9] The evidence shows that the second appellant advised the Choi's to use a *bumiputera* nominee company to buy the call option shares and arranged for a company called Bukit Cendana Sdn Bhd, in which all the shareholders and directors were *bumiputera*s for that purpose. The Choi's initially agreed to this arrangement, and paid an earnest deposit of RM400,000 in the name of Bukit Cendana Sdn Bhd to the first appellant to buy the call option shares.

[10] Subsequently, the Choi's became uncomfortable with the fact that they would purchase the call option shares for a large sum of money using nominees. Therefore they made known to the second appellant that they wanted direct ownership of the call option shares through the respondent.

[11] It is alleged by the respondent that the second appellant then assured the respondent that it could directly purchase the shares from the first appellant so long as the call option was first exercised by the first appellant who could thereafter freely transfer the call option shares to the respondent. The second appellant however advised the Choi's to seek legal advice on the matter.

[12] The respondent alleges that it then consulted the third appellant a lawyer who confirmed that the revised proposal (ie direct purchase by the respondent) was a legal and legitimate one because the relevant 'bumiputera restriction' placed on the call option shares only applied to the *exercise* of the call option which had to be exercised by a *bumiputera* but there was no restriction with regard to the subsequent transfer of those shares to a non-*bumiputera* after the call option has first been exercised by a *bumiputera* (meaning the first appellant).

[13] The respondent alleges that based on the representations assurances and advice outlined above, the respondent entered into an agreement for sale and purchase of shares ('the share sales agreement') dated 12 June 1998 with the first appellant to purchase the call option shares for RM40m. The third appellant represented the respondent in entering into this agreement while a firm called Madzhar Mohd Sapuan & Co represented the first appellant.

[14] In its material parts the share sales agreement contained the following relevant clauses:

Recital D which reads:

D. The Vendor has represented to the Purchaser that he is able to sell/transfer the said shares upon its registration to the Purchaser freely and without any restrictions and based upon the aforesaid representations, the Purchaser has agreed to enter into this Agreement with the Vendor.

Clause 2.4 reads:

2.4 It is further agreed between both parties that in the event that the said shares is discovered subsequent to the signing of the Principal Agreement to be restricted shares and cannot be freely transferable to the Purchaser or his nominee(s) as the case may be, the Purchaser shall have the option to terminate this Agreement and the Vendor shall forthwith refund the deposit together with other monies received by the Vendor (if any) to the Purchaser together with a further sum of Ringgit Malaysia Five Million (RM5,000,000.00) only as agreed liquidated damages or alternatively to affirm the contract subject howsoever that it is agreed between both parties that the purchase price of the said shares shall be adjusted downwards to RM24,000,000.00 only from the original price of RM40 million.

[15] After executing the share sales agreement on 12 June 1998, and paying the first appellant RM5m as deposit, the respondent alleges that the Choi's met one Mr Leng Boon Thai ('PW1') who was a lawyer acting for Matang on an unrelated matter. The Choi's came to know from Mr Leng that the call option shares were restricted shares meant for *bumiputera*s only. Thereafter, the respondent alleges it approached the third appellant to seek confirmation from Matang or MRSB concerning the status of the call option shares but the respondent alleges it received no satisfactory response from the third appellant.

[16] The respondent then approached their present solicitors for advice, whereafter the respondent terminated the share sales agreement and brought this action.

CAUSES OF ACTION AGAINST EACH OF THE APPELLANTS

[17] The respondent's causes of action against the first appellant are for:

(a) misrepresentation;

(b) breach of share sales agreement; and

(c) fraud and/or deceit.

[18] The respondent's causes of action against the second appellant are for:

(a) misrepresentation;

(b) breach of fiduciary duty; and

(c) fraud and/or deceit.

[19] The respondent's causes of action against the third appellant are for: **A**

(a) negligence and breach of duty of care; and

(b) fraud and/or deceit.

[20] The respondent's further or alternative cause of action against all the appellants is for conspiracy to defraud the respondent. **B**

THE HIGH COURT DECISION

C

[21] The learned judge gave judgment in favour of the respondent, as he found that the core issue for determination in respect of all the causes of action pleaded against the appellants was whether the call option shares were 'restricted' or 'unrestricted' shares. The learned judge found as a fact that the call option shares were intended to be restricted shares or *bumiputera* shares. **D**

[22] Following on from his finding above, the learned judge went on to hold that the first appellant was in breach of the representation made by him in Recital D of the share sales agreement thereby entitling the respondent to terminate the said agreement. **E**

[23] As against the second appellant the learned judge found that the second appellant had failed in his duty as an introducer and as a director of the respondent to disclose to the respondent the restriction on the call option shares. **F**

[24] As against the third appellant the learned judge found that he was negligent in the performance in his duties to the respondent as its lawyer at the material time. **G**

[25] A reading of his judgment shows that the learned judge gave judgment against the first, second and third appellants on a joint and several basis.

THE SE APPEALS **H**

[26] Each of the appellants are dissatisfied with the decision of the learned High Court judge as regards his finding of liability against them.

[27] In dealing with the complaints of the appellants, we will begin by addressing a common ground of appeal taken by all the appellants relating to the standard of proof applied by the learned judge. The appellants complain that the respondent's allegation of misrepresentation was one of fraudulent misrepresentation while the allegation of conspiracy was of conspiracy to **I**

defraud, both of which allegations, according to the appellants, needed to be proved against them on a 'beyond reasonable doubt' standard, but the learned judge had wrongly applied a standard based on 'a balance of probabilities'.

[28] Our decision on this point is that, a perusal of the respondent's pleadings show that as far as the allegation of misrepresentation is concerned, the respondent had merely pleaded misrepresentation simpliciter against the appellants, and not of fraudulent misrepresentation as alleged by them. The fact that the learned judge had used the word 'fraudulent' even though it was not so pleaded does not change the fact that what was pleaded by the respondent was misrepresentation only. Accordingly the allegation of misrepresentation made against the first and second appellants needed to be proved on a balance of probabilities only, which standard the learned judge correctly applied.

[29] With regard to the allegation of conspiracy to defraud as well as the allegation of fraud and deceit made against each of the appellants the learned judge does not seem to have come to any finding on the allegations of fraud and deceit as a basis for giving judgment against the appellants and so we will not say anything more on the matter.

[30] With regard to the allegation of conspiracy to defraud, the learned judge did at paras 33–34 of his judgment discuss the joint efforts made by the appellants to convince the respondent to buy the call option shares. Although the learned judge did not say so in so many words, we are satisfied that the learned judge had come to a finding that the allegation of conspiracy to defraud had been proved, but in making that finding the learned judge had applied the standard of a balance of probabilities. We find the learned judge had erred in doing so. On reading the respondent's pleadings we find that it can fairly be said that what the respondent was alleging against all the appellants was that they conspired to defraud or deceive the respondent into buying the call option shares. The conspiracy alleged included a distinct element of dishonest conduct of a criminal nature, in that, the appellants were alleged to have acted in concert to deliberately suppress or withhold from the knowledge of the Choi's or the respondent the true status on the transferability of the call option shares so that the respondent would be deceived into buying the shares. Case law shows that where an allegation of fraud in civil proceedings is made, the standard of proof required must be on a beyond reasonable doubt basis and not on a balance of probabilities. See the Federal Court decision in *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1.

[31] Having said that, we find that the misdirection by the learned judge does not affect the outcome of this case because even though we find that the learned judge's decision on the allegation of conspiracy to defraud made against

each of the appellants should be reversed, the respondent also pleaded other separate causes of action against each of the appellants. It is to those other causes of action to which we now turn in considering each of the appellant's appeal.

THE FIRST APPELLANT'S APPEAL

[32] It is the first appellant's case that the learned judge erred in finding him liable to the respondent.

[33] On the allegation of misrepresentation, the first appellant maintains that once the call option shares were registered in his name, the shares became freely transferable thereafter without restriction. And according to the first appellant it is wrong to speculate that the call option shares would remain restricted in perpetuity because, according to him, once the 'SBKS1' and 'SBKS2' approval are obtained (thereby indicating that the *bumiputera* policy of government must have been satisfied) the call option shares became freely transferable. Therefore the first appellant says that what was stated in Recital D of the share sales agreement did not constitute a misrepresentation nor can he be said to be in breach of contract for the same reason. We do not agree for the reasons that follow.

[34] The first appellant relies on the words 'upon its registration' as the operative words in Recital D. According to him, once the call option sharers are registered in his name, they can be freely transferred without any *bumiputera* restriction because according to the first appellant, he has done so on other occasions in respect of shares reserved for *bumiputera*s.

[35] In our judgment, all the words in Recital D must be read as a whole. When so done, we find that a representation was made by the first appellant to the effect that after the call option shares are registered in the first appellant's name, they can be transferable thereafter 'freely and without restriction', which was not the case. We say so for the following reasons. Even if the first appellant had managed to transfer away *bumiputera* shares registered in his name in other cases, in this instance, the call option shares were offered to the first appellant to be accepted by him on the terms of the consultancy agreement which is mentioned in Recital A of the share sales agreement. It should be noted that cl 6.2 of the consultancy agreement expressly states that the first appellant may only with the prior written consent of Matang or MRSB assign the benefit of the call option only to (a) *bumiputera* individuals acceptable to Matang and MRSB and/or (b) a company incorporated in Malaysia whose shareholders shall always be *bumiputera* individuals and are acceptable to MRSB and Matang.

[36] In our view, when the first appellant entered into the share sales agreement, he was in effect attempting to assign the benefit of the call option to the respondent. There is no evidence that at that point in time, the first appellant had obtained the written consent of Matang or MRSB to do so. Therefore, the representation made by the first appellant in Recital D that on registration of the call option shares in his name, they were freely and without any restriction transferable, was not true as the first appellant had not obtained the written consent of Matang or MRSB to assign the benefit of the call option to others.

[37] For that reason we find the learned judge was correct to find that the first appellant had made a misrepresentation in Recital D and was in breach of contract ie cl 2.4.

THE SECOND APPELLANT'S APPEAL

[38] It was the second appellant's case that the learned judge was wrong to find that he was liable to the respondent as he had not made any misrepresentation to nor was he in breach of his fiduciary duty to the respondent.

[39] On these issues the second appellant contended that the National Economic Policy ('NEP') on *bumiputera* equity participation is not a legal requirement and therefore the second appellant cannot be said to be in breach of any duty to the respondent on the status and transferability of the call option shares.

[40] In our view the legality or otherwise of the NEP on *bumiputera* equity participation is not the issue in this case. Here the evidence shows that whatever the legal status of the NEP may be, Matang had decided for itself that the call option shares would be 'bumiputera shares' and a Circular had been issued to its shareholders to inform them of why the 44 pieces of land had to be transferred to MRSB as the company that would undertake the development of the project. Whilst the evidence shows that the second appellant knew that the call option shares were meant for *bumiputera*s and the second appellant had also attended two meetings at Mr Leng's (Matang's lawyers) office at which those present were informed by Mr Leng that the call option shares were *bumiputera* shares and the second appellant also knew about the Circular issued by Matang to its shareholders, it is our view that the above facts do not show that the second appellant had misrepresented the status of the call option shares to the Choi's because it was the second appellant who suggested the use of a *bumiputera* company ie Bukit Cendana Sdn Bhd to purchase the call option shares. In doing so the second appellant had in fact made disclosure to the Choi's about the status of those shares. Subsequently when the Choi's wanted

to own the call option shares directly through the respondent, we find that whilst the second appellant may have given an assurance to the Choi's that a direct purchase of the call option shares was possible so long as the call option was first exercised by the first appellant, the respondent admits in para 9 of its statement of claim that the second appellant requested the Choi's to seek legal advise on the matter. The second appellant having done so indicates that he had nothing to hide about the revised proposal or that he was intent on misleading the Choi's on the status of the call option shares.

[41] Although in his witness statement as well as in his cross-examination the second appellant admitted to being shown the consultancy agreement and to having read it as a layman, it was not established in evidence that the second appellant knew of what was stated in cl 6.2 regarding the restriction in assignment of the benefit of the call option without the written consent of Matang or MRSB.

[42] Therefore we find that there was no evidential basis for the learned judge to find that the second appellant had misrepresented to the Choi's, on the status of the call option shares.

[43] As regards the respondent's allegation that the second appellant was in breach of his fiduciary duty to the respondent in his position as a director of the respondent, the evidence shows that this cannot be a genuine grievance of the respondents. We say this because the evidence shows the second appellant was only made a director of the respondent company in lieu of the payment to him of his 6% commission though the issuance of shares in the respondent company. The complaint of the respondent is that the second appellant should have made disclosure about the true status of the call option shares after he became a director of the respondent company. We find no substance in this contention as the second appellant had already disclosed to the Choi's that the shares were *bumiputera* shares (hence the need to use Bukit Chendana Sdn Bhd) and later on when the direct purchase was proposed, there is no evidence that the second appellant was aware of the restrictions stated in cl 6.2 of the consultancy agreement.

[44] We therefore find that liability had not been established against the second appellant on the causes of action pleaded against him.

THE THIRD APPELLANT'S APPEAL

[45] It is the third appellant's case that the learned judge was wrong to find he was liable to the respondent as he was not negligent in discharging his duties towards the respondent.

[46] The third appellant contends that the learned judge erred when he relied on unpleaded facts in finding him negligent. The third appellant complains that the judge relied on the fact that article 37 of MRSB's Memorandum and Articles of Association requires the prior approval of the Board of Directors of MRSB to any share transfer, to find that for that reason the call option shares were not freely transferable. The third appellant also complained that there was no evidence that the call option shares were 'restricted shares' in perpetuity, and the judge should not have relied on the evidence of Mr Leng in holding that the shares were not freely transferable.

[47] We find no merit in this contention. A reading of the learned judge's grounds shows that those were not the only reasons given by the learned judge for his findings against the third appellant. More importantly, we find that the learned judge had correctly held that the third appellant as a lawyer was in breach of the duty of care which he owed to the respondent as his client, when he failed to properly advise and disclose to the respondent that before the signing of the share sales agreement, the third appellant had attended two meetings with Mr Leng the lawyer for Matang at which Mr Leng had disclosed Matang's position vis a vis the call option shares and that they were *bumiputera* shares. In our view whether or not Mr Leng's opinion on the status of the call option shares were valid or correct, is not the point in issue. What is in issue is whether the third appellant, knowing of the position taken and opinion held by Matang's lawyer on the status of the call option shares, had a duty to advise his client the respondent about the matter? In our opinion the third appellant clearly did, which he failed to do.

[48] The respondent may not have been strangers to this type of transaction as the third appellant contends, but such fact would not in our view absolve or excuse the third appellant from properly advising the respondent of what he knew about the call option shares as a result of his meeting with Mr Leng so that the respondent could make an informed decision on the matter, including whether to enter into the share sales agreement with or without Matang's or MRSB's written consent. This was especially so in the light of the evidence given by the first appellant in his cross-examination (at p 521 core bundle) that after leaving one of the meetings at Mr Leng's office the third appellant had remarked to the effect that: 'Wah, it's difficult to carry on with this deal', after hearing Mr Leng's position about the status of the call option shares.

[49] We therefore find the learned judge was correct to hold the third appellant liable to the respondent in negligence.

[50] For all the above reasons, and subject to what we are about to say on the

finding of joint and several liability by the learned judge, we dismiss the appeals of the first and third appellants with costs. We allow the appeal of the second appellant with costs.

[51] As we mentioned earlier, the learned judge found the appellants jointly and severally liable to the respondent. Since we are of the view that the learned judge has applied the wrong standard of proof in the conspiracy claim made against all the appellants, his decision on the conspiracy claim is hereby set aside. The result is that the first and third appellants can only be held responsible on a several basis to the respondent, and not jointly.

[52] We accordingly vary the judgment of the High Court to reflect that liability of the first and third appellants is on a several basis. We order that:

(a) the first and third appellants are severally liable to pay the respondent the sum of RM5,000,000 together with interest thereon as ordered by the High Court;

(b) in no event is the respondent entitled to be paid more than the sum of RM5,000,000 by way of principal; and

(c) as agreed by the parties there will be no order as to costs here and below.

Second appellant's appeal allowed with costs and appeals of first and third appellants dismissed with costs.

Reported by Kohila Nesan